BRIEF FOR DISTRICT OF COLUMBIA OCT 17
RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-246

THE MONARCH INSURANCE COMPANY OF OHIO, *Petitioner*

v.

UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR DISTRICT OF COLUMBIA RESPONDENTS IN OPPOSITION

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the District of Columbia, its Commissioner and its Metropolitan Police Chief owe a constitutional duty upon which petitioner, as an insurer of local property owners, can predicate a right to recover compensation for injury and destruction caused by rioting mobs.

COUNTER-STATEMENT OF THE CASE

Petitioner challenges an order of the United States District Court for the District of Columbia entered in a civil action in which petitioner, as the insurer and subrogee of numerous property owners, sought to recover for damage to the property of its insureds emanating from the civil disturbances occurring in the District of Columbia within the 12-day period following the assassination of Dr. Martin Luther King, Jr., in April 1968. Named as defendants were the United States of America (hereinafter "the Federal respondent"), the District of Columbia, the Commissioner of the District of Columbia, and the Metropolitan Police Chief (hereinafter "the District respondents"). (App. 28a-29a.)

In seeking to recover money damages against the District respondents, petitioner alleged generally that these respondents were negligent in formulating plans designed to sacrifice private property to the public service of disturbance control, in failing to adequately preserve the peace and to protect property, in failing to utilize all existing manpower and communication facilities, in failing to warn petitioner's insureds so as to permit them to protect their own property, and in assigning police and National Guard members to various locations in which the riotous activities took place (App. 3a, 27a-37a).

In addition to contending that the District respondents could be compelled to respond in damages on a common law negligence theory, petitioner asserted that the actions of the District respondents gave rise to liability under the Constitution, in that they amounted to a taking of property for public use without just compensation, a denial of due process and equal protection of the law, and an abridgment of privileges and immunities (App. 3a, 37a-38a). Petitioner advanced essentially similar allegations and recovery theories as to the Federal respondent and the case came on before the District Court on the motion of the

District respondents to dismiss the complaint and the motion of the Federal respondent to dismiss the complaint, or, in the alternative, for summary judgment (App. 21a-27a). The District Court dismissed the complaint as to both the District and Federal respondents and filed an extensive opinion in support of its rulings (App. 2a-27a; 353 F. Supp. 1249). The United States Court of Appeals for the District of Columbia Circuit affirmed (App. 1a), and petitioner thereafter filed in this Court a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner advances no ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. And see *Fields* v. *United States,* 205 U.S. 292, 296 (1907). In ruling against petitioner, the Court of Appeals upheld the decision of the District Court that a governmental entity and its top level officials owe no duty to compensate property owners for damages caused by rioting mobs. That holding conflicts with no decision of this Court, with no decision of a circuit court of appeals, and with no decision of the highest court of any state. Indeed, all the reported decisions make clear that, in the absence of a statute (not present in the District of Columbia), no such duty exists. See *Louisiana ex rel. Folsom* v. *Mayor and Administrators of New Orleans,* 109 U.S. 285, 287-288 (1883); *Turner* v. *United States,* 248 U.S. 354, 357-358 (1919); *YMCA* v. *United States,* 395 U.S. 85, 94-96 (1969) (concurring opinion of Mr. Justice Harlan); *Westminster Investing Corp.* v. *G. C. Murphy Co.,* 434 F.2d 521 (D.C. Cir., 1970) and authorities cited at 523; *A. & B. Auto Stores of Jones St., Inc.* v. *City of Newark,* 59 N.J. 5, 279 A.2d 693 (1971); *Jahnke* v. *Incorporated City of Des Moines,* 191 N.W. 2d 780 (Iowa, 1971); *Amos* v. *District of Columbia,* 309 A.2d 305 (D.C. App., 1973).

Since as the authorities overwhelmingly make plain, municipal liability for riot damage is uniquely a matter of legislative responsibility, petitioner's thesis that this Court should grant certiorari in order to consider whether the Constitution may be utilized as a duty-creator of last resort in cases of this kind is totally lacking in substance.

None of this Court's decisions on which petitioner relies even remotely suggests a conflict between the decision below and any rule enunciated by this Court. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), involved the sufficiency of a complaint *vis a vis* the claims of official immunity of a State's Governor and National Guard officials who allegedly engaged in intentionally reckless, willful and wanton misconduct in connection with shootings *by subordinate National Guard members*. As the decisions of this Court previously cited will readily disclose, the matter of the Government's nonliability for injury inflicted by members of rioting mobs is quite different. It involves neither "specific unlawful conduct by * * * [government] personnel" nor the immunity of a government official from liability for such conduct. Cf. *Gilligan* v. *Morgan*, 413 U.S. 1, 11-12 (1973). On the contrary, it gives rise to a rule whereby there is simply no right to recover, apart from any considerations of official or sovereign immunity. Nor does the question involved here bear any logical resemblance to that involved in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as petitioner asserts (petition at 11-12). There, this Court held only that federal law enforcement officers who violate the Fourth Amendment by their direct and personal participation in an unlawful arrest or search may be compelled to respond in damages on a constitutional tort theory. Here, in clear contrast, direct personal wrongdoing on the part of government officers is incontrovertibly nonexistent.

While this Court's decision in *YMCA* v. *United States*, *supra*, involved the asserted liability of a governmental entity in the context of riot control, that case plainly does

not support petitioner's theory (petition at 10-11) that a governmental failure to take adequate protective measures during a riot amounts to a compensable taking of property within the purview of the Fifth Amendment and, if anything, supports a contrary rule. See especially concurring opinion of Mr. Justice Harlan, 395 U.S. at 95.

Clearly therefore, petitioner has fallen far short of presenting a question of sufficient substance and importance to justify the exercise of this Court's certiorari jurisdiction.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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